


The Establishment Clause and Public Schools in the 21st Century

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Public school leaders often find themselves caught between groups with passionately held—but widely varying—views regarding the appropriate role for religion in public schools. Tensions are heightened by the growth of well-funded special interest groups inclined to litigate anywhere a test case arises. By reviewing the most recent judicial reasoning in defining the First Amendment’s Establishment Clause applications to public schools, educational leaders can navigate effectively and appropriately around the divisive issues of church and state.

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 In early September 1863, George and Mary Brotherton gazed with pride on their small farm in North Georgia, hoping for a bountiful fall harvest. By the end of September, their farm lay in ruins, ripped asunder by massive assaults of both Union and Confederate armies in the bloody Battle of Chickamauga. What, they must have wondered, hit us?

School leaders know the feeling—they occasionally find themselves squarely in the battle line as opposing forces pound each other on matters of church and state. Sometimes, they bring these forces down on themselves, either by accident or design. Given the passions aroused by these issues and the growth of interest groups with deep pockets and instincts to litigate, schools are going to continue to be battlegrounds. Understanding the most current judicial reasoning lowers the risk of being caught in the crossfire, especially in an era of potentially groundbreaking changes in judicial interpretation. By examining the most recent federal court cases regarding the First Amendment’s Establishment Clause as applied to public schools,

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educational leaders may be able to navigate effectively and appropriately around the divisive issues that can cost so dear.

Current Status of Establishment Tests

Most school leaders wish for a simple and straightforward map to guide them through the church–state thicket. Alas, such a chart eludes us.

In June 1971, Chief Justice Burger gave us the Lemon Test, the most often-cited guide in determining if an action by government, including public schools, passes constitutional muster:

First, the statute must have a secular legislative purpose; second, the principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster an excessive government entanglement with religion. (*Lemon v. Kurtzman*, 1971, p. 612)

Although this test has survived for more than three decades, its future is uncertain. At least two current Supreme Court justices vehemently believe that this test is a severe misreading of the Constitution and would drive a stake through its heart. Justice Scalia has been the most outspoken: “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys” (*Lamb’s Chapel v. Center Moriches Union Free School District*, 1993, p. 398, Scalia, J., concurring). Justice Thomas believes the test has been discredited (*Cutter v. Wilkinson*, 2005, p. 727, Thomas, J., concurring) and believes the Court’s “Establishment Clause jurisprudence is in hopeless disarray” (*Rosenberger v. Rector and Visitors of Univ. of Va.*, 1995, p. 861, Thomas, J., concurring). Two justices, Kennedy and Breyer, have not enthusiastically embraced it. Justice Kennedy does “not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area” (*County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 1989, p. 655, Kennedy, J., concurring in part and dissenting in part), and Justice Breyer believes that there is “no test-related substitute for the exercise of legal judgment” (*Van Orden v. Perry*, 2005, p. 700, Breyer, J., concurring). The two most recently appointed justices, Roberts and Alito, have yet to participate in a Supreme Court case where the Lemon Test is considered, but as Deputy Solicitor General, Chief Justice Roberts wrote a brief suggesting that the Court replace the Lemon Test with a “single, careful inquiry into whether the practice at issue provides direct benefits to religion in a manner that threatens the establishment of an official church or compels persons to participate in a religion or religious exercise contrary to their consciences” (*Lee v. Weisman*, 1992). It seems an even bet regardless of whether the Lemon Test will survive its next Supreme Court challenge.

In 1984, Justice O'Connor tried to refine the Lemon Test with an "Endorsement Test" that would place the focus on whether a government practice either endorses or disapproves of religion, regardless of what the government intended (*Lynch v. Donnelly*, 1984, p. 687, O'Connor, J., concurring). The Endorsement Test evaluates government action through the eyes of a "reasonable observer," an informed citizen who is presumed to be familiar with the history of the government's action (*McCreary County, Ky. v. ACLU of Ky.*, 2005, p. 881, O'Connor, J., concurring). Although it is widely employed, it too has not produced the definitive answer as to what is constitutionally permissible in every case; the Tenth Circuit found the Endorsement Test "an unworkable standard that offers no useful guidance to courts, legislators or other government actors who must assess whether government conduct goes against the grain of religious liberty the Establishment Clause is intended to protect" (*Bauchman v. West High School*, 1997, p. 552).

Thus, school leaders are without a singular test that can be universally applied. (It should be noted that *Lemon v. Kurtzman* has never been overruled or superseded; as such, despite various criticisms, it still stands as valid judicial precedent, continues to be widely used by both Circuit Courts of Appeal and District Courts, and is still seen as the law of the land.) How have the courts ruled, then, at the various intersections of public schools and religion?

Prayer, Worship, and Ceremonial Deism

In its most recent consideration of prayer in the public schools, a 6-3 majority of the Supreme Court ruled in 2000 that student-led, student-initiated prayers before football games violated the Establishment Clause. Justice Stevens wrote for the majority that

Nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer. (*Santa Fe Independent School District v. Doe*, 2000, p. 313)

The Court found that "the specific purpose of the policy was to preserve a popular state-sponsored religious practice" (*Santa Fe Independent School District v. Doe*, 2000, p. 309) and that the practice of having a referendum on whether to have the invocations and who would deliver the invocation "does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority" (*Santa Fe Independent School District v. Doe*, 2000, p. 304).

Illustrating the continuing differences of judicial opinion, two U.S. Circuit Courts of Appeal have heard cases involving student religious speech at graduation ceremonies subsequent to *Santa Fe* with different results. The Ninth Circuit, on two occasions, has

found that school districts must necessarily refuse to allow students to deliver sectarian prayers or proselytizing speeches at graduation to avoid violating the Establishment Clause (*Cole v. Oroville Union High School Dist.*, 2000; *Lassonde v. Pleasanton Unified School Dist.*, 2003). Additionally, a district court in Eighth Circuit found that a school choir singing the “Lord’s Prayer” at a high school graduation violated all three prongs of the Lemon Test (*Skarin v. Woodbine Community School District*, 2002). However, the Eleventh Circuit, on two occasions, has found that allowing a student elected by her class to deliver unrestricted messages at graduation, even a message containing religious comment, did not on its face violate the Establishment Clause (*Adler v. Duval County School Board*, 2001; *Chandler v. Siegelman*, 2000).

The Supreme Court has upheld one circumstance of state-sponsored prayer against Establishment Clause challenge. In *Marsh v. Chambers* (1983), the Court upheld the Nebraska Legislature’s 128-year-old tradition of opening its sessions with a prayer, allowing an exception for “legislative and other deliberative public bodies” (p. 786). Are school boards considered deliberative public bodies? The answer is not entirely clear. In a case currently making its way through the Fifth Circuit, the judges *en banc* will rehear a 2-1 decision that school boards are deliberative public bodies (*Doe v. Tangipahoa Parish School Board*, 2006). The Sixth Circuit considered the same issue in 1999 and determined that school boards are not deliberative bodies covered by the *Marsh* exception (*Coles v. Cleveland Board of Education*, 1999). An unpublished decision by the Ninth Circuit specifically declined to determine if *Marsh* applied to school boards but found that regular school board prayers “in the Name of Jesus” are unconstitutional (*Bacus v. Palo Verde Unified School Dist. Bd. of Educ.*, 2002).

If prayers are problematic, can a moment of silence be offered as a compromise? A sharply divided Supreme Court invalidated moments of silence for prayer more than 20 years ago (*Wallace v. Jaffree*, 1985), but the battles over moments of silence continue. In 2001, the Fifth Circuit struck down as unconstitutional an amended Louisiana statute permitting school authorities to allow teachers and students an opportunity to observe a brief time of prayer, or meditation, at the start of each school day. The Court found that “the legislative history confirms that the amendment was passed to return verbal prayer to the public schools” (*Doe v. School Board of Ouachita Parish*, 2001, p. 294). That same year, the Fourth Circuit upheld a Virginia statute mandating a moment of silence in all classrooms during which “each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice” (*Brown v. Gilmore*, 2001, p. 270). A sharply divided Fourth Circuit found that the legislative history of the statute showed a secular rather than religious purpose and upheld it, although the dissent called the statute a “thinly veiled attempt to reintroduce state-sanctioned prayer into its schools” (*Brown v. Gilmore*, 2001, p. 282, King, J., dissenting).

More recently, an Alabama high school teacher began her class by asking, “Does anyone have any prayer requests?” After her students offered various dedications, [she] would hold a moment of silence. [She] frequently opened this moment of silence by saying ‘Let us pray,’ and often ended it by saying ‘Amen’” (*Holloman ex rel Holloman v. Harland*, 2004, p. 1261). The same Eleventh Circuit that permitted student prayer at graduation found the teacher’s actions were a clear violation of the Lemon Test and amounted to “blatant and repeated violations of the Establishment Clause” (p. 1289). Finding that “by now it should go without saying that it is unconstitutional for a teacher or administrator (or someone acting at their behest) to lead students aloud in voluntary prayer” (p. 1289), the Court held that the teacher did not have qualified immunity for the violations. Federal law provides that every person who deprives another of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the injured party (Civil Action for Deprivation of Rights, 1983). However, a public official may have “qualified immunity” from such suits if the actions were undertaken within the scope of the official’s discretionary functions. In this case, the Court found that a teacher’s observing a moment of silence or leading a class in prayer was not within the scope of her discretionary functions, so she could be held liable for financial damages. The Court opined that although the principal of the school had not been named as a defendant to these particular violations, the principal could have been held liable under the theory of supervisory liability had he been named a defendant.

Although it seems that almost all forms of prayer that involve adult involvement violate the Establishment Clause, other forms of “ceremonial deism” have been upheld. The most common example is the recitation of “under God” in the Pledge of Allegiance. Most recently, the Fourth Circuit found that although the phrase “under God” in the Pledge of Allegiance is a religious phrase, the nature of the Pledge was a patriotic activity and did not threaten to establish religion “in the same manner that even voluntary school prayer does” (*Myers v. Loudoun County Public Schools*, 2005, p. 408). In 2004, on grounds not related to religious freedom, the Supreme Court denied a challenge to the constitutionality of a school district’s policy of requiring teacher-led recitation of the Pledge (The decision turned on the father’s lack of standing to bring an action in a federal court on behalf of a child for whom he did not have custody) (*Elk Grove Unified School Dist. v. Newdow*, 2004). Justice O’Connor reminded us that the Court has permitted certain commemorations of religion in public life when the commemorations, even if speaking in the language of religious belief, are “idioms for essentially secular purposes” (p. 35, O’Connor, J., concurring). She defined ceremonial deism based on the action’s history and ubiquity, absence of worship or prayer, absence of reference to particular religion, and minimal religious content. Although she conceded that the phrase “under God” in the Pledge is “a close question” (p. 37), she believed that

certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding

principles of liberty. It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it. (pp. 44-45)

It seems, then, that current jurisprudence would approve of practices that are clearly ceremonial, have long-standing traditions, are not specific to a certain religion, and have minimal religious content. Some Americans wish for a far greater role for religion, particularly Christianity, in public schools, and they see these restrictions as hostile to both religion and American tradition. Other Americans would prefer a much higher and more impenetrable wall between church and state than these guidelines offer, and they also cite American tradition and experience as justification. Voluminous litigation has failed to set limits that are acceptable to all; thus, the judicial debate continues on what constitutes acceptable public expressions of religious sentiments.

Creationism/Intelligent Design (ID)

Control of the curriculum has often been a contentious issue, dating to the infamous *Scopes Monkey Trial* (*Scopes v. State*, 1927). The most recent decision involves an attempt by a Pennsylvania school district to mandate the teaching of ID in high school biology. After a lengthy review of the arguments for ID, the Court found that “a reasonable, objective observer would . . . reach the inescapable conclusion that ID is an interesting theological argument, but that it is not science” (*Kitzmiller v. Dover Area School District*, 2005, pp. 745-746). The Court concluded that the purpose of including ID in the curriculum was to promote religion in public schools and that the policy failed both the Lemon Test and the Endorsement Test. The Court awarded legal fees and damages to the plaintiffs, and in the end, the School Board paid them \$1,000,011.

The Court underscored the tenor of the proceedings with these comments:

Those who disagree with our holding will likely mark it as the product of an activist judge. If so, they will have erred as this is manifestly not an activist Court. Rather, this case came to us as the result of the activism of an ill-informed faction on a school board, aided by a national public interest law firm eager to find a constitutional test case on ID, who in combination drove the Board to adopt an imprudent and ultimately unconstitutional policy. The breathtaking inanity of the Board’s decision . . . has now been fully revealed through this trial. The students, parents, and teachers of the Dover Area School District deserved better. (*Kitzmiller v. Dover Area School District*, 2005, p. 765)

Another case involving evolution is making its way through the Eleventh Circuit, but its final result has not been reached. In that case, a suburban Atlanta,

Georgia, school district required that a sticker be affixed to biology textbooks describing evolution as a theory that should be approached with an open and critical mind. The district court found that the sticker violated both the Lemon Test and the Endorsement Test and ordered the stickers removed. On appeal, the Eleventh Circuit vacated the order and remanded the case for additional evidentiary hearings (*Selman v. Cobb County School District*, 2006). The circuit court was careful to make clear that it was not making any rulings on the legal issues involved but was simply seeking more facts, so we do not know if the sticker will be allowed.

A similar evolution case merits note. A Louisiana school district required that a disclaimer be read immediately before teaching any lesson involving evolution. The Fifth Circuit found the disclaimer to violate both the Lemon Test and the Endorsement Test, prohibited the school district from continuing the practice, and awarded attorney's fees to the plaintiffs (*Freiler v. Tangipahoa Parish Board of Education*, 1999). The contents of the Georgia sticker is not as explicit a warning as the Louisiana disclaimer; however, if the Eleventh Circuit ruling regarding the Georgia sticker conflicts with the Fifth Circuit ruling prohibiting the Louisiana disclaimer, the Georgia case could provide an opportunity for the Supreme Court—with its new members—to review the Lemon Test.

To date, the Georgia sticker case notwithstanding, the federal courts have consistently ruled that limitations on the teaching of evolution, or the requirement to teach creationism or ID, run afoul of the Establishment Clause. Continued clashes are likely, however, as proponents shift the battle to the rights of individual teachers to include creationism or ID in their classrooms.

Distribution of Religious Literature

Schools often come under pressure from community groups to distribute religious materials to their students. A case currently under way in Missouri tests again the wisdom of succumbing to those pressures.

For many years, South Iron R-1 School District had allowed the Gideons to come into school and distribute Bibles to fifth graders during class time. The superintendent decided to stop this practice in 2005, believing it violated the Establishment Clause. When his decision was questioned at a board meeting, the board voted to “pretend this meeting never happened, and to continue to allow the Gideons to distribute Bibles as we have done in the past” (*Doe v. South Iron R-1 School District*, 2006, p. 1095). At subsequent meetings, other alternatives were discussed, but the Gideons continued to insist that they be allowed to distribute the Bibles, despite warnings from the board attorney that the action was unconstitutional and notice from the district's insurance company that it would not fund any defense should legal action ensue. Ultimately, the superintendent resigned, telling the board he felt it was “headed down a path that is both illegal and costly” (p. 1095). When legal action followed, the board claimed that its policies created an “open forum”

and that it could not engage in viewpoint discrimination. The district court disagreed, granting the plaintiff's request for a preliminary injunction to halt the distribution of the Bibles and ruling that the school board members were not entitled to qualified immunity for their prior practices that violated the Establishment Clause. Although this is an ongoing suit, the judge has ruled that "it is highly likely that plaintiffs will prevail on their claim that the new policy was introduced for the purpose of promoting Christianity" (p. 1094) and will treat the matter as an expedited case.

A similar case was litigated in Louisiana. In that case, an elementary school principal presented each child in the plaintiff's fifth grade class with a Bible and the wish "Merry Christmas." The court found that these actions violated every known test of the Establishment Clause and issued a ban on distributing Bibles in the manner used by the principal. However, the court refused the plaintiff's motion that would ban all Bible distribution in the public schools of the district, noting that it could "imagine a situation where the School Board offers a comparative culture, ethics, history, civilization, or religion class, where Bibles and other religious and non-religious books are used as part of a basic course of study" (*Jabr v. Rapides Parish School Board*, 2001, p. 665).

Other recent cases have involved the distribution of religious announcements on school campus, and one is especially important because the decision was written by now Supreme Court Justice Alito. The case involved an effort by a religious group, Child Evangelism, to participate in back-to-school nights, distribute materials to students, and post materials on school walls. Because the school district allowed (in fact, encouraged) other groups to do each of these things, the Court found that the exclusion of Child Evangelism was unconstitutional: "To exclude a group simply because it is controversial or divisive is viewpoint discrimination" (*Child Evangelism Fellowship of New Jersey v. Stafford Township School District*, 2004, p. 528). The school district argued that its actions were necessary to avoid an impermissible endorsement of religion, but the Court, using both the Lemon Test and Endorsement Test, found that allowing Child Evangelism to have equal access to outlets available to other groups would not rise to an Establishment Clause violation. The Court found that the school district "has clearly engaged in a practice of viewpoint discrimination that cannot be justified as an effort to avoid an Establishment Clause violation" (p. 536).

Other federal courts have reached similar conclusions. In Ohio, a parent contended that the school's distribution of flyers advertising religious activities violated the Establishment Clause. The Sixth Circuit disagreed. Using both the Lemon Test and the Endorsement Test, the appellate court found no Establishment Clause violation (*Rusk v. Crestview Local School District*, 2004). In an Arizona case, the Ninth Circuit ruled that a school district would not violate the Establishment Clause by distributing flyers announcing a summer camp that emphasized religious themes. However, the Court noted that the school district

is not obligated to distribute material that, in the guise of announcing an event, contains direct exhortations to religious observance. . . . The district cannot refuse to distribute literature advertising a program with underlying religious content where it distributes quite similar literature for secular summer camps, but it can refuse to distribute literature that *itself* contains proselytizing language. The difference is subtle, but important. (*Hills v. Scottsdale Unified School District*, 2004, p. 1053)

In an unpublished Florida case, a school district was upheld by the Eleventh Circuit for refusing to allow the distribution of literature regarding abortion and abortion alternatives, but the Court struck the policy used to prevent the distribution on Free Speech grounds because of “significant risks of arbitrary censorship” (*Heinkel v. School Board of Lee County, Florida*, 2006, p. 608).

Clearly, public schools may not be active participants in delivering religious texts, such as the Bible or the Quran, but if schools allow some groups to distribute announcements and information, schools cannot discriminate against religious groups engaging in the same activities if the announcements and information are neither proselytizing nor advocating particular religious messages. This may be a more difficult line to draw than it seems. In an effort to accommodate one group that has broad community support, a school could open its channels to other groups with less public support. Schools are open to claims of viewpoint discrimination if they try to pick and choose as to who gets to use the public schools’ distribution networks.

Release Time and Religious Instruction

Two recent federal appellate court cases revisit the concept of religious teaching during the public school day, a matter first decided by the Supreme Court more than a half century before (*Illinois ex rel. McCollum v. Board of Education*, 1948; *Zorach v. Clauson*, 1952). New York law allows students to be released from the public schools to receive religious instruction away from school property. The plaintiffs in *Pierce v. Sullivan West Central School District* (2004) claimed that the program violated the Establishment Clause by, among other things, conveying a message of endorsement of religion to impressionable young students, by subjecting the plaintiffs to abusive religious invective when they did not participate in the release time program, by promoting Christianity over other religion, and by promoting religion over nonreligion. The Second Circuit disagreed, finding that “the schools only adjusted ‘their schedules to accommodate the religious needs of the people’” (p. 60). Furthermore, the Court noted that the Supreme Court has instructed that “not . . . every state action implicating religion is invalid if one or a few citizens find it offensive” (p. 61).

On the other end of the spectrum is *Doe v. Porter* (2004), litigated in the same Tennessee school district that hosted the Scopes Monkey Trial in 1925. The district

allowed the staff and students of a Christian college to conduct a “Bible Education Ministry” (BEM) for 30 minutes each week during the school day in three elementary schools in the district. Although the district claimed that BEM was optional, it did not tell that to students, and apparently no student ever opted out of BEM. BEM lesson plans were never reviewed by school employees and included such objectives as to teach second graders that they should obey all of God’s commandments, that they should read their Bibles and pray every day, and that Jesus loves them, and to teach first graders that God created everything and on which days He did it, evincing what the Court said was “an intention to teach the Bible as literal truth” (p. 563). At trial, the School Board argued “that the BEM program does not teach religion, but that its purpose and effect is to teach character” (p. 913). The trial court did not find that a convincing argument and neither did the Sixth Circuit. The Court called the School Board’s oversight of BEM “woefully derelict” (p. 563) and that BEM’s “occurrence during the school day and on school property sends a clear message of state endorsement of religion—Christianity in particular—to an objective observer” (p. 563).

To some, it may seem unbelievable that a program such as BEM could even exist, let alone be defended in litigation, and then appealed. However, this case reveals the emotions aroused by such issues. The parents and children who complained about the BEM felt the need to protect their identity by suing under the pseudonym *Doe*, a decision itself that was challenged by the School Board. The principal of the local high school was quoted as saying that had he known who was challenging the BEM, he ““would have tried to alert him. . . . I’d have said: ‘Look do you want to cause your family trouble?’” This is a rural, conservative place, and very emotional about religion. Attack religion and crusades begin”” (p. 560). The Court allowed the plaintiffs to proceed as *Doe*, noting the following letter to the editor of a local paper:

You are cowards because you won’t give us your name. You know the people in Rhea County would come up to your face and tell you what we think if you. I would love to come face to face with you because yes I would tell you what I thought of you and I would let my sons tell you too. You have hurt my sons and I will not let no one [sic] hurt one of my children. We might not know you but someone higher does[,] and yes you will answer to him. (p. 562)

At trial, the school board argued that “Rhea County is a place where they respect the Bible, it ought therefore to be at liberty to teach the tenets of the Bible in its public schools as truth” (p. 915). To this, the district court responded:

It is probably true that the citizens of Rhea County who are of the Christian faith are in the majority. This, however, does not give them license to teach religion in the public schools. The Constitution in this area and others protects persons who happen to be in the minority. We all—the majority and the minority—live

in the same Nation. The Constitution protects each one of us, including those who may not have the same religious views as the School Board. (p. 915)

School leaders across the nation find themselves squarely between the factions represented in *Pierce v. Sullivan*—those who are uncomfortable with almost any accommodation of religion—and those represented in *Doe v. Porter*—those who wish to bring what the district court called the equivalent of Christian Sunday School classes into the public schools. The courts have been consistent in holding that any form of instruction containing reference to religion must be strictly nondevotional, closely supervised, and clearly focused on history, literature, or social custom. Other forms of religious instruction must be taught away from school premises and without any involvement or endorsement by public schools. Yet persons with strongly held beliefs at both extremes continue to exert pressure to form public schools in their own image.

Religious and Holiday Displays

“No holiday season is complete, at least for the courts, without one or more First Amendment challenges to public holiday displays” (*Skoros v. City of New York*, 2006, p. 3). In *Skoros v. City of New York* (2006), a challenge was brought against the New York City public schools for a policy that allowed a display on school grounds consisting of a menorah as a symbol of the Jewish holiday of Chanukah and a star and crescent as a symbol of the Islamic holiday of Ramadan, but it did not allow the display of a nativity scene as a symbol of the Christian holiday of Christmas. The plaintiffs sued, according to the Court, “not so much to preclude defendants’ use of the menorah or the star and crescent as it is to compel inclusion of the crèche in public school holiday displays” (p. 4). Relying on the Lemon Test, a 2-1 majority Court found that the display served the school system’s secular purpose of “teaching pluralism by celebrating the City’s rich cultural diversity and by encouraging school children to show respect and tolerance for traditions other than their own” (p. 18). By displaying the Jewish and Islamic religious symbols with a variety of other holiday symbols, the school system did not endorse religion, and the display did not involve excessive entanglement of church and state, even if it did purposefully exclude one religion.

In another recent case, *Weinbaum v. Las Cruces Public Schools* (2006), the plaintiff challenged the school district’s emblem, used on its maintenance vehicles and in other forms, for its inclusion of three crosses. The Court found no Establishment Clause violation, particularly since the “Las Cruces” name is widely understood in the community to mean “the crosses” (p. 1121).

Although the case did not involve a public school, a Third Circuit decision deserves mention because the 2-1 majority opinion was authored by now Supreme

Court Justice Alito. For at least 30 years, Jersey City had placed a menorah and a Christmas tree in front of its city hall, but it was permanently enjoined by the Third Circuit in 1995 from continuing the practice, or any substantially similar display, because the display impermissibly endorsed Christianity and Judaism. Ultimately, Jersey City tried again by adding Kwanzaa symbols, a sled, figures of Frosty the Snowman and Santa Claus, and two signs referring to cultural diversity. Using the Lemon Test and Establishment Tests, then Judge Alito found the modified display did not rise to an unconstitutional establishment of religion as a reasonable observer would consider the display a celebration of diversity (*American Civil Liberties Union of New Jersey v. Schundler*, 1999).

In 2005, the Supreme Court heard two cases dealing with the display of the Ten Commandments on government property. In the closely decided *McCreary County, Ky. v. ACLU of Ky.* (2005) case, a five-member majority found that placing the Ten Commandments on the grounds of county courthouses violated the Lemon Test. A similarly divided court upheld a monument on the grounds of the Texas state capital that displayed the Ten Commandments (*Van Orden v. Perry*, 2005). The swing vote was that of Justice Breyer, who, in his concurrence in the Texas case, indicated that he would not uphold a display of the Ten Commandments on school grounds (p. 703, Breyer, J., concurring). A year earlier, in an unpublished opinion, the Sixth Circuit, the same court whose *McCreary* decision was later upheld by the Supreme Court, found that a Ten Commandments display at a public high school violated the Lemon Test, primarily because of the overtly religious nature of the Ten Commandments and because its display lacked a secular purpose (*Baker v. Adams County/Ohio Valley School Bd.*, 2005).

Public displays involving traditional religious symbols appear to be permissible if they celebrate diversity, even if they do not include symbols from every religion. The diversity must be genuine, however, and not a guise to promote a particular religious view. However, as Justice Breyer has noted, “on the grounds of a public school . . . given the impressionability of the young, government must exercise particular care in separating church and state” (*Van Orden*, 2005, p. 703, Breyer, J., concurring).

Review of Professional Literature

If court rulings do not provide a universally applicable standard, is there an answer in the professional literature? A review of recent professional literature for principals reveals that no researcher has defined a guide that can advise school leaders in every case where religion crosses paths with public schools. Seigler (2003) tries to provide school leaders with help in finding the boundaries between government and religion by describing two interpretive methods, *stare decisis* and original intent, often employed by jurists to decide Establishment Clause cases. Mawdsley (1998) summarized the emergence in the 1990s of three counterbalances to the Establishment Clause; however, he noted that “legitimate concerns still exist

regarding public school endorsement of religion” (p. 16). Okun (1996) reviewed *Lemon v. Kurtzman*, discussed earlier, and other important Establishment Clause cases, then focused on prayer in public schools, particularly at high school graduation ceremonies. She found that although inviting a member of the clergy to offer prayer at official ceremonies had been ruled constitutionally impermissible, student-led prayer at such ceremonies was, at the time at least, unsettled law.

Russo (2006) described for primarily Canadian readers the Establishment Clause jurisprudence in the United States, then focused on the Second Circuit Court of Appeals ruling in *Skoros v. City of New York* (2006), also discussed earlier. He concluded that although the Second Circuit had demeaned Christianity in the name of diversity, “about the only thing that is certain is that litigation on this highly contentious topic of religion in public schools will not soon abate” (Russo, 2006, p. 81). Dolan (2004) considered the faith-based provisions of the No Child Left Behind Act, evaluating them against Establishment Clause jurisprudence involving direct and indirect governmental aid to parochial schools. He concluded that although no case had yet been adjudicated, it is doubtful that faith-based provisions will be struck as unconstitutional. A case just decided by the U.S. Supreme Court, *Hein v. Freedom From Religion Foundation, Inc.* (2007), supports that conclusion by holding that taxpayers do not have standing to allege an Establishment Clause violation because of executive branch expenditures for faith-based initiatives.

Brownfield (2007) has examined jurisprudence regarding anti-evolution and balanced treatment legislation, also discussed earlier. She finds that although clear and consistent jurisprudence has held that such legislation infringes on the Establishment Clause, “proponents of creationism will persist in their attempt to have a religious-based theory taught alongside, or in place of, evolution. It appears that no judicial opinion will ever sway their efforts” (Brownfield, 2007, p. 141). McCarthy (2004) has noted, in reviewing whether states may adopt more stringent anti-establishment guarantees than those demanded by the First Amendment, that the courts have allowed for more than 30 years for “play in the joints” between the Free Exercise and Establishment Clause.

What we learn from the literature is that every decision seemingly opens another question, and no researcher believes that a single reliable guide is currently available or foreseeable in the near future.

A Remarkable System That Works

Neither courts nor scholars have found an unerring path through disagreements about the true meaning of “make no law respecting an establishment of religion.” As our grand experiment in democracy and freedom continues, we need more than ever public school leaders who understand that the passionately held and widely diverse views on religion are almost certain to come into conflict. Schools are likely to be situated, as were the unfortunate Brothertons, between seething groups pitted against

each other. Yet despite extreme differences of opinion, our court system has worked remarkably well in preserving individual liberties while maintaining majority rule. As Justice O'Connor noted in one of her last public statements on government in religion,

The goal of the [First Amendment religion] Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly? (*McCreary County*, 2005, p. 882, O'Connor, J., concurring)

Conclusion

Prevailing judicial precedent presents some apparent contradictions and finding the proper balance is a good deal trickier when well-funded special interest groups are lying close by, ready to do battle anywhere an appropriate test case emerges.

At present, the Establishment Clause tests enunciated in *Lemon* and the Endorsement Test formulated by Justice O'Connell in *Lynch* continue to offer the best guidance for school leaders navigating these difficult issues. *Lemon* focuses on the "intent" of the government. It looks at the governmental purpose underlying the contested practice (religious or secular), its primary effect on the advancement or inhibition of religion, and the extent of the government involvement in the implementation of the practice. The Endorsement Test is an outcome-driven test, that is, whether the practice actually endorses or disproves religion regardless of the government's intent in promulgating the practice. Before his appointment to the Supreme Court, Justice Roberts explored the benefits of a new test that would consider whether the practice at issue provides a direct benefit to religion by compelling participation in a religious exercise or threatening the establishment of an official church. Similar to the Endorsement Test, this approach looks at outcome with no consideration of the government's intent in instituting the practice.

Applying these tests, the courts have reached some bright-line conclusions. More frequently, however, courts have rendered rulings tailored to the facts of the particular lawsuit before them and which cannot be readily generalized to other situations with differing facts. Table 1 summarizes the current status of selected issues.

For the present, the courts have determined that student-initiated and -led prayers before or during the school day or at school sponsored events such as football games and graduation are not permissible under the Establishment Clause.

Likewise, a graduation speech that carries only a proselytizing message violates the Establishment Clause. On the other hand, incidental religious comments by a student-elected speaker during graduation have been upheld in two cases as not prohibited by the Establishment Clause. Courts have routinely determined that moments of silence during the school day for the purpose of prayer are unconstitutional, but a statute adopted in Virginia, which provided for a moment of silence for broader purposes (and not just for prayer), was recently upheld as passing Constitutional muster.

Courts have approved early release time for religious instruction but have refused to permit Bible instruction during the school day because, in the court's view, it presented a clear message of endorsement of a specific religion. Religious study as part of a comparative religions or cultures class is permissible as long as it is nondevotional, closely supervised, and clearly focused on history, literature, or social custom. Courts have upheld the display of religious symbols as part of a multicultural holiday event celebrating diversity but prohibited the posting of the Ten Commandments on school grounds as overly religious and lacking a prevailing secular purpose.

Courts have concluded that schools may not exercise discrimination in the distribution of literature. If the distribution channels of a school are opened to secular groups for advertising goods and services to students, sectarian groups must be offered the same privilege. Schools must draw the line, however, if the materials are proselytizing in nature. Thus, the distribution of a flyer promoting after-school activities administered by a church is permissible, whereas the distribution of a Bible by that same church group is not.

Courts have recognized the concept of "Ceremonial Deism" based on the long history of its use by the "deliberative bodies" of our government, the absence of actual worship, the absence of reference to a particular religion, and its minimal religious content. The courts see no harm to the Establishment Clause in the inclusion of "Under God" in the Pledge of Allegiance or in prayers before sessions of Congress or a State Legislature. Oftentimes, however, Ceremonial Deism has not been found to be applicable in public schools because of the impressionable nature of school-aged children. In addition, courts have never accorded School Boards the same status as legislative bodies, having struck down prayers said at School Board meetings and other functions primarily because of the School Board's overriding connection with the children they serve.

Finally, under the Lemon and Endorsement Tests, courts have struck down the teaching of ID as a scientific theory and have invalidated a Louisiana law that required that a disclaimer be read prior to any class where evolution was mentioned. However, there is litigation pending in Georgia that would again consider the use of a disclaimer, albeit a watered down version of the one already discredited by the court in Louisiana.

The issue of church and state, especially when related to public schools, raises acute and often acrimonious debate. Citizens with strong and diverse opinions,

Table 1. Summary of Permissible and Impermissible Behavior

Issue	Permissible Behavior	Impermissible Behavior	Recent Court Cases
Prayer	Silent voluntary individual prayer	State sponsored, including student led, student initiated, such as before athletic events Sectarian, proselytizing prayer Teacher-led prayer	<i>Santa Fe v. Doe</i> (2000) <i>Lassonde v. Pleasanton</i> (2003); <i>Cole v. Oroville</i> (2000); <i>Skarin v. Woodbine</i> (2002) <i>Holloman v. Harland</i> (2004)
Religious speech	Student speech with religious content at graduation ceremonies	Proselytizing speech	<i>Adler v. Duval</i> (2001); <i>Chandler v. Siegelman</i> (2000) <i>Lassonde v. Pleasanton</i> (2003); <i>Cole v. Oroville</i> (2000)
Moments of silence	Individual exercise of a silent activity	Attempts to return verbal prayer to public schools	<i>Brown v. Gilmore</i> (2001) <i>Doe v. Ouachita</i> (2001)
Ceremonial deism	Pledge of Allegiance Commemorations, secular purposes with minimum religious content		<i>Myers v. Loudoun</i> (2005) <i>Elk Grove v. Newdow</i> (2004)
Intelligent Design (ID), evolution		Teaching ID as science	<i>Kitzmiller v. Dover</i> (2005)

	Evolution disclaimers		<i>Selman v. Cobb</i> (2006)—pending
		Evolution disclaimers	<i>Freiler v.</i> <i>Tangipahoa</i> (1999)
Distribution of religious literature	Teaching comparative religion or culture	Distributing Bibles by school personnel for noncurricular purposes	<i>Jabr v. Rapides</i> (2001)
		Distributing Bibles during class time	<i>Doe v. South Iron</i> (2006)
Distribution of religious announcements	Advertise religious activities when ad itself is not proselytizing	Viewpoint discrimination (allowing some groups without allowing others)	<i>Child Evangelism v.</i> <i>Stafford</i> (2004); <i>Rusk v.</i> <i>Crestview</i> (2004); <i>Hills v.</i> <i>Scottsdale</i> (2003)
		Distributing proselytizing literature	<i>Heinkel v. Lee</i> <i>County</i> (2006); <i>Hills v. Scottsdale</i> (2003)
Religious instruction	Release student per state statute for religious instruction		<i>Pierce v. Sullivan</i> (2004)
		Religious instruction in school by third parties	<i>Doe v. Porter</i> (2004)
Religious displays	Celebrate religious diversity		<i>Skoros v. New York</i> (2006)
	Incidental religious symbolism		<i>Weinbaum v. Las</i> <i>Cruces</i> (2006)
		Posting Ten Commandments	<i>McCreary v. ACLU</i> (2005); <i>Van Orden v. Perry</i> (2005); <i>Baker v. Adams</i> (2004)

fanned to action by deep-pocketed special interest groups, willingly act to halt what they believe are grievous injuries to the public good. Because “the First Amendment of the Constitution . . . fundamentally operates to protect minority interests” (*Bauchman*, 1997, p. 545), some see many judicial rulings as striking at the heart of the majority’s wish to institute practices acceptable to so many in the community. Others believe that religious freedom is so fundamental to our liberty as Americans that no governmental involvement with religion is acceptable. School leaders, called to referee these genuinely held differences, must be vigilant in ensuring that school practices are in close compliance with prevailing judicial precedent.

References

- Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001), cert. denied, 532 U.S. 905 (2001).
- American Civil Liberties Union of New Jersey v. Schundler*, 168 F.3d 92 (3d Cir. 1999).
- Bacus v. Palo Verde Unified School Dist. Bd. of Educ.*, 52 Fed.Appx. 355 (9th Cir. 2002).
- Baker v. Adams County/Ohio Valley School Bd*, 86 Fed.Appx. 104 (6th Cir. 2004) cert. denied, 545 U.S. 1152 (2005).
- Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997).
- Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001), cert. denied, 534 U.S. 996 (2001).
- Brownfield. E. Y. (2007). The First Amendment implications of teaching the theory of evolution and creationism in public schools. *Journal of Law and Education*, 36(1), 141-149.
- Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000), cert. denied, 533 U.S. 916 (2001).
- Child Evangelism Fellowship of New Jersey v. Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004).
- Civil Action for Deprivation of Rights, 42 U.S.C. § 1983.
- Cole v. Oroville Union High School Dist.*, 228 F.3d 1092 (9th Cir. 2000), cert. denied sub nom. *Neimeyer v. Oroville Union High School Dist.*, 532 U.S. 905 (2001).
- Coles v. Cleveland Board of Education*, 171 F.3d 369 (6th Cir. 1999), reh. denied, 183 F.3d. 538 (1999).
- County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).
- Cutter v. Wilkinson*, 544 U.S. 709 (2005).
- Doe v. Porter*, 188 F.Supp.2d 904 (E.D. Tenn. 2002), aff’d, 370 F.3d 558 (6th Cir. 2004).
- Doe v. School Board of Ouachita Parish*, 274 F.3d 289 (5th Cir. 2001).
- Doe v. South Iron R-1 School District*, 453 F.Supp.2d 1093 (E.D. Mo. 2006).

Doe v. Tangipahoa Parish School Board, 473 F.3d 188 (5th Cir. 2006), reh. *en banc* granted, 478 F.3d 679 (2007).

Dolan, W. (2004). No Child Left Behind's faith-based initiative provision and the Establishment Clause. *Journal of Law and Education*, 33(1), 1-19.

Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004).

Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337 (5th Cir. 1999).

Hein v. Freedom From Religion Foundation, Inc., ___ U.S. ___, ___ S.Ct. ___, 2007 WL 1803960 (U.S. June 25, 2007).

Heinkel v. School Board of Lee County, Florida, 194 Fed.Appx. 604 (11th Cir. 2006).

Hills v. Scottsdale Unified School District, 329 F.3d 1044 (9th Cir. 2003), cert. denied, 540 U.S. 1149 (2004).

Holloman ex rel Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004).

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).

Jabr v. Rapides Parish School Board, 171 F.Supp.2d 653 (W.D. La. 2001).

Kitzmiller v. Dover Area School District, 400 F.Supp.2d 707 (M.D. Pa. 2005).

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).

Lassonde v. Pleasanton Unified School Dist., 320 F.3d 979 (9th Cir. 2003), cert. denied, 540 U.S. 817 (2003).

Lee v. Weisman, 505 U.S. 577 (1992).

Lemon v. Kurtzman, 403 U.S. 602 (1971).

Lynch v. Donnelly, 465 U.S. 668 (1984).

Marsh v. Chambers, 463 U.S. 783 (1983).

Mawdsley, R. D. (1998). The principal and religious activity. *NASSP Bulletin*, 82(599), 10-17.

McCarthy, M. (2004). Room for "Play in the Joints"—*Locke v. Davey*. *Journal of Law and Education*, 33(4), 457-475.

McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844 (2005).

Myers v. Loudoun County Public Schools, 418 F.3d 395 (4th Cir. 2005).

Okun, S. J. (1996). Religion in the public schools: What does the First Amendment allow? *NASSP Bulletin*, 80(581), 26-36.

Pierce v. Sullivan West Central School District, 379 F.3d 56 (2d Cir. 2004).

Placing Harry Potter in school libraries not endorsement of Wicca religion. (2007). *School Law News*, 35(3), 8.

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).

Rusk v. Crestview Local School District, 379 F.3d 418 (6th Cir. 2004).

Russo, C. J. (2006). Of Baby Jesus and the Easter Bunny: Does Christianity still have a place in the educational marketplace of ideas in the United States. *Education Law Journal*, 16(1), 61-81.

Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).

Seigler, T. J. (2003). Understanding original intent and *stare decisis*: Two methods of interpreting the Establishment Clause. *Educational Administration Quarterly*, 39(2), 208-238.

Selman v. Cobb County School District, 390 F.Supp.2d. 1286 (N.D. Ga. 2005), vacated and remanded, 449 F.3d. 1320 (11th Cir. 2006).

Skarin v. Woodbine Community School District, 204 F.Supp.2d 1195 (S.D. Iowa 2002).

Skoros v. City of New York, 437 F.3d. 1, 3 (2d Cir. 2006), cert. denied, ___ U.S. ___, 127 S.Ct. 1245, 75 USLW 3094 (U.S. Feb 20, 2007).

Wallace v. Jaffree, 472 U.S. 38 (1985).

Weinbaum v. Las Cruces Public Schools, 465 F.Supp.2d 1116 (D.N.M. 2006).

Van Orden v. Perry, 545 U.S. 677 (2005).

Zorach v. Clauson, 343 U.S. 306 (1952).

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